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No. 07-1125

In the Supreme Court of the United States

LISA RYAN FITZGERALD AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND RUSSELL DEVER,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether Congress intended the right of action that courts have implied under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), to preclude the use of 42 U.S.C. § 1983 to present claims of unconstitutional gender discrimination in schools.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 504 F.3d 165. The opinion of the district court regarding Title IX (Pet. App. 26a-41a) is reported at 456 F. Supp. 2d 255. The oral opinion of the district court regarding 42 U.S.C. § 1983 (Pet. App. 42a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2007. On December 27, 2007, Justice Souter extended the time for filing the petition for a writ of certiorari to March 3, 2008. The petition for a writ of certiorari was filed on March 3, 2008, and granted on June 9, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the dep-

> rivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * * .

STATEMENT

In this case, the First Circuit held that Congress intended Title IX of the Education Amendments of 1972 to preclude use of 42 U.S.C. § 1983 to assert claims of unconstitutional gender discrimination by educational institutions. This decision turns Title IX on its head. As Title IX's plain terms make clear, the statute was designed to expand, rather than contract, the protections available for victims of gender discrimination. There is absolutely no evidence that Congress intended Title IX's prohibition of gender discrimination by federally funded educational institutions to *withdraw* pre-existing remedies that had been available to assert rights under the Equal Protection Clause.

In fact, the compelling evidence is all to the contrary. Title IX and section 1983 differ significantly in their scope; Congress could not have intended one to be a substitute for the other. Title IX includes no express private right of action at all; Congress could not have intended to preclude recourse to section

1983 for the assertion of constitutional claims while leaving it to the courts to decide the circumstances in which a substitute right of action would be implied under Title IX. And Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, a provision that had been uniformly applied at the time of Title IX's enactment to *permit* the assertion of claims under section 1983; Congress must be understood to have endorsed that reading of the statutory language. The First Circuit's decision, which takes absolutely no account of this evidence, should be set aside.

A. Statutory Background

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race in all programs and institutions receiving federal financial assistance, providing: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The text of Title VI does not provide a private right of action for racial discrimination; the only express remedy offered by the statute is the withholding of federal funds from the offending program or institution. See 42 U.S.C. § 2000d-1. Courts, however, have long understood Title VI to authorize an implied private right of action to redress racial discrimination by federally funded programs. See *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 703 (1979).

Title IX of the Education Amendments of 1972 prohibits gender discrimination in federally funded education programs and activities, using terms that are virtually identical to those in Title VI. The stat-

ute provides that, with specified exceptions, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Like Title VI, Title IX does not expressly provide for any private right of action, instead specifying administrative remedies, including the cut-off of federal funds. See *Gebser* v. *Lago Vista Indep. School Dist.*, 524 U.S. 274, 280 (1998). But the Court has held that Title IX authorizes an implied right of action for individuals to bring suit against institutions for the redress of gender discrimination, just as does Title VI for instances of racial discrimination. *Cannon*, 441 U.S. at 703. Such private suits under Title IX may seek injunctive and monetary relief. See *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

Independently of the implied causes of action available under Titles VI and IX, section 1983 and its predecessors have, for more than a century, provided the principal cause of action for enforcement of federal statutory and constitutional rights abridged by a "person" acting "under color of state law." Among the constitutional rights that may be enforced through section 1983 is the Fourteenth Amendment's Equal Protection Clause. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 531 (1996); *Forrester* v. *White*, 484 U.S. 219 (1988).

There are significant differences between actions brought under Title IX and those brought under section 1983. *First*, section 1983 allows an individual to challenge constitutional violations by "[e]very person" – a term encompassing natural persons as well as certain public entities, see *Monell* v. *Dep't of Soc.*

Servs., 436 U.S. 658 (1978) – while Title IX has been construed to provide a remedy only against institutions. See, *e.g.*, *Rasnick* v. *Dickenson County School Bd.*, 333 F. Supp. 2d 560 (W.D. Va. 2004). *Second*, section 1983 provides an action against only public institutions, reaching such institutions whether or not they accept federal funds; Title IX applies to institutions (public or private) that accept federal funds, but exempts certain categories of institutions and activities from its reach. *Third*, there are differences in the substantive reach of the Equal Protection Clause and of Title IX, which is grounded in the Constitution's Spending Clause. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 181-82 (2005); *id.* at 184-85 (Thomas, J., dissenting); *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 641-42 (1999); *id.* at 672 (Kennedy, J., dissenting). Given their different constitutional pedigrees, there is no certainty that they will be applied identically in every circumstance.

B. Factual Background

As a five-year-old kindergarten student at Hyannis West Elementary School, Jacqueline Fitzgerald was subjected to repeated, vicious sexual harassment by Briton Oleson, a third-grade schoolmate. This harassment, recognized as "grotesque," "significantly shocking and traumatic," and "severe, pervasive, and objectively offensive" by both courts below (Pet. App. 1a, 8a, 35a) – and characterized by the district court as "a parent's worst nightmare[]" (*id.* at 26a) – recurred frequently over a six-month period during the 2000-2001 school year.

Jacqueline rode the school bus to and from her elementary school most days. Each time she wore a dress or a skirt to school – approximately two or

three times a week, and approximately 50 times over six months – Oleson would force Jacqueline to lift her skirt, pull down her underwear, and spread her legs in front of him and their classmates on the bus. Pet. App. 2a-3a. Oleson and the other students on the school bus would then mock and laugh at Jacqueline. JA 15a. Oleson was in a position to harass the much younger Jacqueline because the school's practice was to place disruptive older children in seats next to the kindergarteners near the front of the bus. *Id.* at 16a. The district court determined that this harassment "far exceeded mere teasing," fell "outside the scope of inevitable student misconduct," and was "outright sexually offensive." Pet. App. 35a.

During this six-month period, Jacqueline exhibited signs of serious emotional and physical distress, including weight loss, insomnia, renewed bedwetting, illnesses, and tearfulness. JA 15a. Jacqueline would also on occasion pretend that she was dead. *Ibid.* Jacqueline's parents, petitioners here, noted her severe emotional and physical problems, and notified the school guidance counselor. *Ibid.*

On February 14, 2001, six months after the harassment began, Jacqueline informed her parents of the abuse. Pet. App. 2a. They immediately contacted the school's principal, Frederick Scully, to report the harassment. *Ibid.* A meeting was called at the school between petitioners and school officials. *Ibid.* Shortly afterwards, Jacqueline identified Oleson as the perpetrator. *Id.* at 3a. Principal Scully indicated that it was indeed school policy to place students with disciplinary problems, like Oleson, directly behind kindergarten students on the school buses. JA 16a.

The school did not have a formal, written policy to address peer-on-peer sexual harassment. JA 14a. Indeed, school superintendent Russell Dever stated that the school "did not see sexual harassment as discrimination." Dep. of Russell J. Dever, at 17-18, Exh. 6 to Aff. of Wendy A. Kaplan, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. July 31, 2006). Dever also indicated it was school policy to not consider the alleged harasser's past disciplinary record when addressing the incident at hand. *Id.* at 27-29.

The school initiated an ad hoc investigation. Although Oleson denied responsibility for the incidents, other students confirmed the harassment; Principal Scully, however, determined that "they were too young to be credible." Pet. App. 28a. The local police department launched a concurrent investigation but found "there was insufficient evidence to proceed *criminally* against [Oleson]." Pet. App. 3a (emphasis added). The school, relying in part on the decision by the police department not to take criminal action, imposed no disciplinary measures against Oleson. *Ibid.*

Rather than restore to Jacqueline the access to educational resources she would have had in the absence of the harassment, the school's "primary suggestion" in response to the misconduct was a proposal to place Jacqueline on a different bus than Oleson. Pet. App. 4a. Petitioners rejected this suggestion because it would force Jacqueline rather than her male harasser to alter her behavior, effectively punishing the female victim, and would not prevent further misconduct by Oleson. *Ibid.*

Petitioners proposed alternative remedies, including transferring Oleson to a different bus. Pet.

App. 4a. Petitioners also requested on numerous occasions, both during and after the investigation, that an adult monitor be placed on the bus. JA 16a, 18a, 20a. The district court found that "[a] bus monitor could easily have prevented this harassment." Pet. App. 41a. The school, however, refused to implement either of petitioners' suggestions. JA 16a, 18a, 20a. Superintendent Dever acknowledged that the school had the resources to place a monitor on the bus, but decided against it. Dep. of Russell J. Dever, Exh. 6 to Aff. of Wendy A. Kaplan, at 60, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. Apr. 2, 2002).

Petitioners were forced to drive their daughter to school each day, despite interference with their employment and child care responsibilities. JA 16a. But Jacqueline nevertheless experienced repercussions from the harassment even after school officials were made aware of the abuse. Jacqueline often encountered Oleson in the school hallways and on one occasion Oleson was invited to participate in Jacqueline's gym class, where the teacher (whom the school had not apprised of the harassment) directed Jacqueline to give Oleson a "high five." Pet. App. 4a. She continued to experience extreme emotional and physical distress as a result of these incidents. JA 20a, 21a. Jacqueline stopped participating in gym class, did not take the public school bus, and began suffering from "an atypical number of absences." Pet. App. 29a.[1]

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[1] Petitioners allege that the school's investigation was inadequate. JA 17a, 22a. They point to the school's interview of Oleson, during which Oleson's stepfather stated that Oleson had "trouble with the truth" and Oleson was caught dissembling; Principal Scully's removal of the school's prevention specialist

C. Proceedings in the District Court[2]

Petitioners filed suit in the United States District Court for the District of Massachusetts after the school district failed to provide an adequate and nondiscriminatory response to the sexual harassment. Their complaint alleged violations of Title IX, the U.S. Constitution, and Massachusetts state law, seeking injunctive relief and compensatory and punitive damages. Petitioners brought the Title IX claim against the School Committee and the constitutional claim, advanced under section 1983, against both the School Committee and Superintendent Dever, respondents here. In the latter claim, petitioners al-

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from the investigation after she found a witness that corroborated Jacqueline's account; and the failure of school officials to question the bus driver. See Br. For Plaintiffs-Appellants at 8-9, *Fitzgerald* v. *Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007) (No. 06-2596). Nor, petitioners allege, did school officials take reasonable steps to prevent Oleson's further interactions with Jacqueline. Despite petitioners' repeated requests of Scully to do so, neither Jacqueline's teacher nor other adults at the school were notified about the harassment, instead being told only to inform Scully if Jacqueline seemed upset. JA 19a, 20a-10]. The school administration then failed to separate Jacqueline from Oleson. *Id.* at 20a. Notwithstanding these and other allegations, the court of appeals determined that the school responded adequately to each incident of harassment. Pet. App. 12a-16a Although petitioners strongly disagree with this conclusion and with the court of appeals' rejection of Title IX liability on this showing, those determinations were not challenged in the petition for certiorari and are not now before the Court.

[2] The published district court opinion is captioned *Hunter ex rel. Hunter* v. *Barnstable School Committee* because the court employed pseudonyms to protect the identities of the minor parties. The parties abandoned the use of pseudonyms in the court of appeals. See Pet. App. 2a n.1.

leged that Jacqueline had "a clearly established right under state and federal statutory and constitutional law to equal access to all benefits and privileges of a public education, and a right to be free of sexual harassment in school." JA 23.

The district court granted respondents' motion to dismiss petitioners' section 1983 claim under Fed. R. Civ. P. 12(b)(6) without addressing the merits of that claim, holding that Title IX's remedial scheme "is preemptive of a section 1983 claim." Pet. App. 60a. This ruling had the effect of precluding the development of constitutional disparate treatment claims that petitioners could have advanced against both the School Committee and Superintendent Dever individually, such as the possibility that the school discriminated on the basis of sex in both the investigation and the proposed remedy.[3] The ruling also pretermitted any exploration of possible differences in the substantive scope of Title IX and the Equal Protection Clause.

The parties proceeded to conduct discovery and further litigation on petitioners' Title IX sexual harassment claim. On respondents' motion for summary judgment on that claim, the district court found the sexual harassment of Jacqueline so severe and pervasive as to constitute "hostile environment harassment." Pet. App 34a-35a (citation omitted). Moreover, the court found that the simple act of placing a monitor on the bus "could easily have prevented this

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[3] See, *e.g.*, Br. for Plaintiffs-Appellants at 9, *Fitzgerald* v. *Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007) (No. 06-2596) (respondents "treated Briton Oleson, the male perpetrator, deferentially, and certainly more favorably than it treated the female minor plaintiff").

harassment." *Id.* at 41a. In the court's view, however, Title IX was not violated because additional harassment did not occur after the school learned of the misconduct. Pet. App. 40a.

D. The Court of Appeals Decision

The court of appeals affirmed the district court's grant of summary judgment, as well as the earlier dismissal of petitioners' section 1983 claim on preclusion grounds. Pet. App. 1a-25a. The court of appeals agreed that, if the allegations of the complaint are true, Jacqueline was subjected to severe and pervasive sexual harassment, that the harassment deprived her of the benefits of her educational institution, and that the school had actual knowledge of the situation. *Id.* at 8a. And the court of appeals rejected the district court's view that there could be no Title IX liability if the harassment ceased after the school learned of it. *Id.* at 9a. But the court of appeals nevertheless rejected petitioners' Title IX claim because it believed that the school's response to the harassment was objectively reasonable. *Id.* at 10a-16a.

Of particular importance here, the court of appeals went on to affirm the district court's decision that Title IX's remedial scheme precludes use of section 1983 to advance claims that gender discrimination by educational institutions violates the Equal Protection Clause. Pet. App. 23a-25a. Relying on this Court's decision in *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005), and *Smith* v. *Robinson*, 468 U.S. 992 (1984), the court held that the private right of action implied by the courts under Title IX is "sufficiently comprehensive" to preclude use of section 1983 to

advance claims of Title IX *statutory* violations, and that this is so even if substantive limitations on the scope of Title IX actions would be inapplicable to suits brought under section 1983. Pet. App. 22a. The court then held that this preclusion analysis "appl[ies] with equal force" *to constitutional equal protection claims* brought under section 1983. *Id.* at 23a. Like the district court, the court of appeals accordingly refused to address the merits of petitioners' equal protection claim, instead concluding (*id.* at 24a):

> The comprehensiveness of Title IX's remedial scheme – especially as embodied in its implied right of action – indicates that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions – and that is true whether suit is brought against the educational institution itself or the flesh-and-blood decision-makers who conceived and carried out the institution's response. It follows that the plaintiffs' equal protection claims are also precluded.

INTRODUCTION AND SUMMARY OF ARGUMENT

All agree that, in determining whether use of section 1983 is precluded, the decisive consideration "'is what Congress intended.'" *Rancho Palos Verdes*, 544 U.S. at 120. To affirm the decision below, the Court accordingly would have to find that Congress intended Title IX to bar the use of section 1983 to advance constitutional claims of gender discrimination in schools. But that is an exceedingly peculiar – indeed, a shocking – proposition. Accepting it would

mean that Congress, by enacting a statute that was intended to provide *additional* protections for victims of gender discrimination, also meant to withdraw all statutory remedies for the vindication of *existing* constitutional rights. It also would mean that Congress had such a preclusive intent even though the old and new remedies differ significantly in scope. And it would mean that Congress intended to preclude use of section 1983 to enforce the Constitution by enacting a statute that provides *no express private rights at all*, thus leaving it to the courts to decide the nature of the new substitute remedy.

Congress could not have had, and in fact demonstrably did not have, any such intent. The First Circuit's contrary ruling is wrong, for several reasons.

A. Title IX was modeled directly on Title VI; the statutory language and clear legislative background leave no doubt that Congress intended Title IX to be interpreted as was Title VI. And at the time that Title IX was enacted, the courts uniformly had interpreted Title VI to *permit* parallel Title VI and section 1983 constitutional claims, even if the constitutional and statutory claims presented by the plaintiff were substantially identical. That history is dispositive here, because Congress must be understood to have been aware of and to have approved that approach when it adopted the language of Title IX in the new statute without material change. That understanding also is strongly supported both by the unquestioned purpose of Title IX, which was to strengthen protections for victims of gender discrimination, and by express statutory language indicating that Congress envisioned continued constitutional litigation challenging gender discrimination.

B. That direct evidence of congressional intent is enough to dispose of this case. But the court of appeals also went fatally astray in regarding the three decisions in which this Court has held that Congress precluded use of section 1983 to stand for the proposition that congressional creation of a private action to enforce a *newly created statutory right* presumptively precludes use of section 1983 to enforce *pre-existing constitutional rights*. In two of these decisions, *Sea Clammers* and *Rancho Palos Verdes*, the Court held that Congress barred the use of section 1983 to enforce newly created statutory rights when it also created specialized procedures and remedial rules to enforce those rights. Those decisions stand for the common-sense proposition that Congress generally does not intend plaintiffs to circumvent limits it has imposed on remedies for the enforcement of particular rights by enforcing those rights under section 1983. The decisions provide no support for the very different proposition, embraced by the First Circuit, that Congress's creation of new rights and remedies should be presumed to substitute a new statutory for the existing constitutional remedy, and to revoke section 1983 as a means of enforcing the Constitution.

In the third decision relied upon by the court below, *Smith* v. *Robinson* – the only case in which this Court has ever held that Congress precluded use of section 1983 to advance a constitutional claim – Congress acted expressly to establish a new statutory regime for the enforcement of a handicapped child's constitutional equal-protection right to a public education, providing a detailed and intricate set of remedies that Congress regarded as the best means of effectuating that right. That remedial mechanism would have been wholly circumvented had section

1983 been available to enforce the same right. But Title IX presents nothing remotely like the elaborate remedial regime considered in *Smith*: it is not identical in substantive scope to the Equal Protection Clause and creates no specialized procedural mechanism at all.

C. There is an additional reason the decision below is wrong: this Court has never held use of section 1983 precluded by an *implied* right of action like the one recognized by the courts under Title IX. This is for good reason. It is impossible to believe that Congress intended to displace section 1983 as the means for challenging violations of the Constitution while leaving it to the courts through the implication of a private remedy to establish the limits on and contours of the alternative action.

ARGUMENT

I. THE LANGUAGE AND PURPOSE OF TITLE IX DEMONSTRATE THAT CONGRESS DID NOT INTEND TO PRECLUDE USE OF SECTION 1983 TO ADVANCE CONSTITUTIONAL CLAIMS OF GENDER DISCRIMINATION.

A. Congress Must Be Understood To Have Endorsed The Approach Taken By Courts That, At The Time Of The Enactment Of Title IX, Allowed Parallel Title VI And Section 1983 Claims To Proceed.

The decisive consideration in this case "'is what Congress intended.'" *Rancho Palos Verdes*, 544 U.S. at 120. But the most striking thing about the decision below is that the court of appeals made no attempt to find that intent by using the ordinary tools

of statutory construction. The First Circuit paid no heed at all to the language, structure, evolution, or purposes of Title IX; instead, it applied a set of presumptions to divine Congress's intent indirectly. See Pet. App. 17a-18a, 24a. That was a fatal failure. Courts must be guided "by textual indication, express or implicit, that the [new statutory] remedy is [meant] to complement, rather than supplant, § 1983." *Rancho Palos Verdes*, 544 U.S. at 122. And here, there is compelling direct evidence that Congress had just such an intent.

The language of Title IX was adopted directly from Title VI – which, at time of the enactment of Title IX, had been widely and uniformly applied by the courts to permit the assertion *both* of implied Title VI claims *and* of constitutional claims under section 1983. Congress must be understood to have been aware of that interpretation of Title VI and to have endorsed it by using language identical to Title VI in enacting Title IX. That conclusion is dispositive here.

1. To begin with, there is no doubt that Title IX "was modeled after Title VI of the Civil Rights Act of 1964." *Gebser*, 524 U.S. at 286. As the Court has explained:

> Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.

Cannon, 441 U.S. at 694-696 (footnotes omitted). See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 514 (1982) (Title IX was "[p]atterned after Title VI of the Civil Rights Act of 1964").

The relationship between the provisions was emphasized by the drafters of Title IX. Sen. Bayh, who introduced the legislation that became Title IX and was its principal sponsor, explained that "[t]his is identical language, specifically taken from Title VI"; he noted that "[w]e are only adding the 3-letter word 'sex' to existing law." 117 Cong. Rec. 30407, 30408 (1971) (quoted in *Cannon*, 441 U.S. at 694 n.16). Title IX thus gave "the federal Government the same power – no more, no less – to prevent discrimination on the basis of sex that the Federal Government now has to prevent discrimination on the basis of race." *Id*. at 30412 (Sen. Bayh). See *North Haven*, 456 U.S. at 523 n.13.[4]

In particular, and again as the plain statutory language establishes beyond dispute, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon*, 441 U.S. at 696. See *North Haven*, 456 U.S. at 546 (Powell, J., dissenting) ("When Congress passed Title IX, it expected the new provision to be interpreted consis-

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[4] The Court has specifically noted that Sen. Bayh's remarks "are an authoritative guide to the statute's construction." *North Haven*, 456 U.S. at 526-527. Related legislation introduced in the House "would simply have added the word 'sex' to the list of discrimination prohibited by * * * Title VI." *Cannon*, 441 U.S. at 694 n.16. Title IX ultimately was enacted as a separate provision because Congress determined that its scope should be limited to educational institutions. See *Cannon*, 441 U.S. at 694 n.16.

tently with Title VI, which had been its model.") Sen. Bayh thus explained that "[t]he same [enforcement] procedure that was set up and has operated with great success under [Title VI], and the regulations thereunder[,] would be applicable to discrimination" prohibited by Title IX (117 Cong. Rec. 30408 (1971)); "[t]he provisions have been tested under Title VI of the 1964 Civil Rights Act for the last 8 years so we have evidence of their effectiveness and flexibility." 118 Cong. Rec. 5807 (1972). See *id.* at 5803, 5807 (Sen. Bayh) (enforcement provisions of Title IX "parallel" those of Title IV). This Court accordingly had "no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI." *Cannon*, 441 U.S. at 703.

2. The congressional decision to borrow the Title VI substantive standards and remedial mechanism for Title IX through the use of identical statutory language is enough to dispose of this case. A central ground for the Court's holding in *Cannon* was the recognition that, "[i]n 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy." 441 U.S. at 696. And as the Court also recognized, in many of these Title VI cases section 1983 "provided an alternative and express cause of action." *Id.* at 696 n.21. See *ibid.* (noting in some Title VI cases "language suggesting that § 1983 may have provided the cause of action"). Congress therefore must be understood to have endorsed the courts' recognition that Title VI and section 1983 provided parallel, and equally available, rights of action, and that the Title VI cause of action incorporated into Title IX did *not* preclude recourse to section 1983.

In fact, the Court in *Cannon* may have significantly understated the volume of pre-Title IX litigation that advanced *both* Title VI *and* section 1983 constitutional claims. Not one of these decisions held – and, so far as we are aware, not one even suggested – that Title VI precluded the assertion of constitutional equal protection claims under section 1983, even if the constitutional and statutory claims presented by the plaintiff were substantially identical.

The decisions entertaining parallel Title VI and section 1983 constitutional claims included several notable decisions of the courts of appeals, among them *Alvarado* v. *El Paso Indep. Sch. Dist.*, 445 F.2d 1011 (5th Cir. 1971) (Title VI and section 1983 equal protection challenge) and *Nashville I40 Steering Committee* v. *Ellington*, 387 F.2d 179, 181 (6th Cir. 1967) (Title VI and Fifth and Fourteenth Amendment challenge). And *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (5th Cir. 1967) – which this Court specifically noted in *Cannon* had been decided by a "distinguished panel" that included Judge Wisdom (who wrote the opinion), then-Judge Burger, and Judge Brown (see 441 U.S. at 696 & n.20) – presented both Title VI and Fourteenth Amendment claims. See *id*. at 725-726 & n.16 (White, J. dissenting). See also *Don* v. *Okmulgee Memorial Hospital*, 443 F.2d 234 (10th Cir. 1971) (reaching the merits, but denying § 1983 and Title VI claims for discriminatory employment practices); *Gautreaux* v. *Chicago Housing Authority*, 436 F.2d 306 (7th Cir. 1970) (reaching merits on complaint demanding relief under both § 1983 and Title VI); *Glover* v. *Daniel*, 434 F.2d 617 (reaching merits of § 1983 and Title VI employment discrimination claim); *Green St. Ass'n* v. *Daley*, 373 F.2d 1 (7th Cir. 1967) (addressing § 1983 and Title VI challenge to Chicago housing project).

In addition, numerous district courts had permitted Title VI and section 1983 claims to be brought simultaneously by the time Congress enacted Title XI. See, *e.g.*, *Anderson* v. *San Francisco Unified Sch. Dist.*, 357 F. Supp. 248 (N.D. Cal. 1972) (finding violations of § 1983 and Title VI in school employment practices); *Zarate* v. *State Dep't of Health & Rehabilitative Services*, 347 F. Supp. 1004 (S.D. Fla. 1971) (granting summary judgment to plaintiffs on a § 1983 and Title VI challenge to exclusionary provision), aff'd, 407 U.S. 918 (1972); *Morrow* v. *Crisler*, No. 4716, 1971 WL 184 (S.D. Miss. Sept. 29, 1971) (finding for plaintiffs in a § 1983 and Title VI challenge to Mississippi's employment practices); *Bradley* v. *Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971) (finding for plaintiffs on § 1983 and Title VI challenge to school segregation), aff'd, 479 F.2d 960 (5th Cir. 1973), rev'd, 418 U.S. 717 (1974); *Strain* v. *Philpott*, 331 F. Supp. 836 (M.D. Ala. 1971) (finding § 1983 and Title VI violation for Alabama's employment practices); *Oliver* v. *Kalamazoo Bd. of Ed.*, 346 F. Supp. 766 (W.D. Mich. 1971) (granting § 1983 and Title VI challenge to school segregation), aff'd, 448 F.2d 635 (1971); *Gomperts* v. *Chase*, 329 F. Supp. 1192 (N.D. Cal. 1971) (addressing § 1983 claim for violations of both constitutional and Title VI rights); *Ward* v. *Winstead,* 314 F. Supp. 1225, 1235 (N.D. Miss. 1970) (considering, *sua sponte*, whether Mississippi's policy violated Title VI, because "no prejudice will result to defendants since the issues and proof under § 2000d are included in the issues and proof under the Equal Protection allegations"); *Marable* v. *Alabama Mental Health Bd.*, 297 F. Supp. 291 (M.D. Ala. 1969) (granting § 1983 equal protection and Title VI challenge to mental health system administration); *Everett* v. *Riverside Hose Co. No. 4, Inc.*, 261 F.

Supp. 463 (S.D.N.Y. 1967) (addressing § 1983 and Title VI challenge to fire department hiring); *LeBeauf* v. *State Bd. of Ed. of La.*, 244 F. Supp. 256 (E.D. La. 1965) (challenge under 42 U.S.C. §§ 1981, 1983 , and 2000d). See also *English* v. *Town of Huntington*, 335 F. Supp. 1369 (E.D.N.Y. 1970) (holding that plaintiffs had standing to bring § 1983 and Title VI challenge to urban renewal program).

That Congress enacted Title IX against the unquestioned background of suits advancing both Title VI statutory and section 1983 constitutional claims – and that it accordingly would have expected the identically phrased Title IX also not to foreclose the assertion of constitutional claims under section 1983 – answers the question in this case. "'[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.'" *Rowe* v. *New Hampshire Motor Transport Ass'n*, 128 S.Ct. 989, 994 (2008) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006)). See also *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978).

That rule of construction is applicable in all cases. And it applies with special force here. "It is always appropriate to assume that our elected representatives * * * know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX." *Cannon*, 441 U.S. at 697-98. Given the enormous volume of this parallel Title VI and section

1983 constitutional litigation that preceded enactment of Title IX, as well as the exceptional public importance of cases of this sort, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar" with those cases "and that it expected its enactment to be interpreted in conformity with them." *Id.* at 699.

In fact, that Congress envisioned continued constitutional litigation after passage of Title IX is confirmed by the statutory text. As part of the amendment that enacted Title IX, Congress added the word "sex" to 42 U.S.C. § 2000h-2, which authorizes the United States to intervene "[w]henever an action has been commenced in any court of the United States *seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution* on account of race, color, religion, sex or national origin" (emphasis added). See Pub. L. 92-318 § 906, 86 Stat. 375 (1972) (Title IX provision inserting "sex"). The Congress that enacted Title IX thus specifically contemplated and provided for suits advancing constitutional claims of gender discrimination (which it assuredly knew would proceed under section 1983) – and, needless to say, it accordingly could not have intended Title IX to preclude such claims.

3. Whether the pre-Title IX decisions were correct in their understanding that Title VI was not meant to foreclose recourse to section 1983 is, for present purposes, immaterial. "'[T]he relevant inquiry is not whether Congress correctly perceived the state of the law, but rather what its perception of the state of the law was.'" *Cannon*, 441 U.S. at 711 (quoting *Brown* v. *GSA*, 425 U.S. 820, 828 (1976)). See *Franklin*, 503 U.S. at 71 ("we evaluate the state

of the law *when the Legislature passed Title IX*") (emphasis added). It may be added, though, that Congress in fact plainly did *not* intend Title VI to foreclose the use of section 1983 to advance constitutional claims of racial discrimination.

For one thing, when Congress enacted Title VI, section 1983 provided the principal cause of action for suits challenging racial discrimination, a matter of the greatest currency in the years immediately predating the enactment of Title VI. Section 1983 and its predecessor statutes had been invoked in many of the leading cases of the day, including such matters as, for example, *Brown* v. *Board of Ed.*, 347 U.S. 483 (1954); *McNeese* v. *Board of Ed. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668 (1963) (§ 1983 challenge to school segregation); and *Progress Dev. Corp.* v. *Mitchell*, 286 F.2d 222 (7th Cir. 1961) (§ 1983 challenge to racial discriminatory housing covenants). It is inconceivable that Congress meant Title VI, *sub silentio*, to preclude use of such a historically significant and proven tool for vindicating the right to equal protection.

Not surprisingly, the clear evidence is that Congress had no such goal; as Justice White put it in *Cannon*, Title VI exhibits "no intention to cut back on private remedies existing under 42 U.S.C. § 1983 to challenge discrimination occurring under state law." 441 U.S. at 719 (White, J., dissenting). To the contrary, members of Congress "show[ed] full awareness that private suits [under section 1983] could redress discrimination contrary to the Constitution and Title VI, if the discrimination were imposed by public agencies." *Id*. at 721. Senator Case, for example, declared that Title VI "is not intended to limit the rights of individuals, if they have any way of en-

forcing their rights apart from the provisions of the bill, by way of suit or any other procedure." 110 Cong. Rec. 5256 (1964). Senator Humphrey, the principal sponsor of Title VI, responded that "I thoroughly agree with [Sen. Case] insofar as an individual is concerned," adding that, "[a]s a citizen of the United States, he has his full constitutional rights. He has his right to go to court and institute suit and whatever may be provided in the law and the Constitution. There would be no limit on the individual." *Ibid.*

There is no reason to doubt Justice White's conclusion about this aspect of the congressional debate: "Section 1983 provides a private remedy to deprivations under color of state law of any rights 'secured by the Constitution and laws,' and nothing in Title VI suggests an intent to create an exception to this historic remedy for vindication of federal rights as against contrary state action." *Cannon*, 441 U.S. at 723-24 (White, J., dissenting).[5] The decision below cannot be squared with this understanding.

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[5] In the years *after* enactment of Title IX, the lower courts have divided on whether Title VI precluded use of section 1983 to advance claims of racial discrimination. Compare, *e.g.*, *Powell* v. *Ridge*, 189 F.3d 387, 402 (3d Cir. 1999) (no preclusion), overruled on other grounds by *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and *Cousins* v. *Secretary of Transportation*, 857 F.2d 37, 44-45 (1st Cir. 1988) (same), with *Boulahanis* v. *Bd. of Regents*, 198 F.3d 633, 641 (7th Cir. 1999) (preclusion), and *Alexander* v. *Underhill*, 416 F. Supp. 2d 999, 1007 (D. Nev. 2006) (same). The courts that applied a rule of preclusion, however, paid absolutely no attention to Title VI's actual purpose and history. We note that the Court has several times, without comment, entertained a suit that presented both Title VI and section 1983 claims. See, *e.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244, 275-76 (2003). In any event, as noted above, the critical question here

B. Title IX Was Intended To Strengthen Remedies Against Gender Discrimination.

1. The broader purposes of Title IX confirm that Congress could not have meant the statute to preclude use of section 1983 to advance constitutional claims of gender discrimination. The congressional goal is manifest in the statutory language: "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of Federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. See *North Haven*, 456 U.S. at 514-15, 525. And as also is manifest from the plain statutory language, which in effect simply added "sex" to the anti-discrimination provisions of preexisting law, the purpose of Title IX was to "close[] loopholes in existing legislation." 118 Cong. Rec. 5803 (1972) (Sen. Bayh). Specifically, "[d]iscrimination against the beneficiaries of federally assisted programs and activities [wa]s already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition d[id] not apply to discrimination on the basis of sex. In order to close this loophole, [Title IX] set[] forth prohibition and enforcement provisions which generally parallel the provisions of title VI." *Id.* at 5807.

Title IX, like Title VI before it, thus was intended to provide *additional* protection to those who suffer

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is the state of judicial interpretation of Title VI at the time that Congress enacted Title IX.

discrimination. Nothing in the statute, or in the circumstances that gave rise to its enactment, suggests any disapproval for, or any intent to curtail, existing remedies for victims of gender discrimination. To the contrary, Title IX was designed to "*expand* some of our basic civil rights and labor laws" so as to "provide women with solid legal protection from * * * persistent, pernicious discrimination." 118 Cong. Rec. 5807 (1972) (Sen. Bayh) (emphasis added). It was regarded as "an important first step in the effort to provide for the women of America something that is rightfully theirs." *Id.* at 5808 (Sen. Bayh). To conclude that Title IX was intended to *diminish* existing constitutional remedies against gender discrimination in any respect would turn this statutory purpose on its head.

In fact, such a reading of Title IX would have a host of perverse effects. It would mean that acceptance of federal funds insulates an institution and its officials against any statutory cause of action for constitutional violations. And because Title IX generally has been understood not to provide a cause of action against individuals, it also would mean that acceptance of federal funds immunizes school officials from *all* liability for establishing unconstitutionally discriminatory policies. A statute that was designed to "avoid the use of federal resources to support discriminatory practices" (*Cannon*, 441 U.S. at 704) could not have been meant to have such an effect.

2. Attributing such a purpose to Title IX is especially strained because the Congress that enacted the statute would have been aware that the Constitution provided relief from gender discrimination. Although in the early 1970s such claims had not been

as widely litigated as had those for discrimination on the basis of race, in 1971 this Court issued its decision in *Reed* v. *Reed*, 404 U.S. 71, "rul[ing] in favor of a woman who claimed that her State had denied her the equal protection of its laws." *United States* v. *Virginia*, 518 U.S. at 532. The Court has regarded that decision "as a seminal case." *Id.* at 560 (Rehnquist, C.J., concurring in the judgment).

Moreover, just the year before the decision in *Reed*, in a suit advancing equal protection claims under section 1983, the district court ruled that female applicants to the University of Virginia had been "denied their constitutional right to an education equal with that offered men at Charlottesville and that such discrimination on the basis of sex violates the Equal Protection Clause of the Fourteenth Amendment." *Kirstein* v. *Rector & Visitors of Univ. of Virginia*, 309 F. Supp. 184, 187 (D.C. Va. 1970). Although, as noted above, it must be presumed that Congress was aware of this precedent, there is no need to rely on assumptions here; the Virginia case was specifically noted and discussed with approval during the congressional debate on the legislation that became Title IX. See 117 Cong. Rec. 39259-60 (1971) (Rep. McClory) ("The University of Virginia is under court order right now to end its discrimination against women. I feel that other public institutions also should be required to end their sex discrimination."). It can hardly be the case that legislation designed to "expand some of our basic civil rights and labor laws" (118 Cong. Rec. 5804 (Sen. Bayh)) also was intended to bar such suits.

And that is especially so in light of other contemporaneous legislative action. Just two months prior to Title IX's enactment on June 23, 1972, Congress

sent the proposed Equal Rights Amendment to the Constitution – which had been overwhelmingly approved by both Houses – to the states for ratification. See 118 Cong. Rec. 9907 (March 23, 1972) (sending the ERA to the states for ratification); see also 117 Cong. Rec. 35815 (1971) (House approved Equal Rights Amendment by vote of 354-24); 118 Cong. Rec. 9598 (1972) (Senate approved Equal Rights Amendment by vote of 84-8). There is every reason to believe that Congress anticipated that the rights created by this proposed Amendment, like all other individual rights conferred by the Constitution, would be enforceable through litigation under section 1983. See, *e.g.*, 117 Cong Rec. 35295 (Oct. 6, 1971) (Rep. Griffiths) ("Why should not this body pass this national policy amendment on equal rights for all women, and then let the courts determine whether or not we have made them equal[?]"). To say the least, it would have been exceptionally anomalous for Congress, even as it was attempting to confer express constitutional protections against gender discrimination – and even as it recognized that Title IX did "not go as far as the equal rights amendment" (117 Cong. Rec. 39251 (1971) (Rep. Green) – also to have withdrawn section 1983 as a mechanism with which to enforce those protections in a very significant category of cases. The Court should not find that Congress took such a self-defeating step.

II. TITLE IX DOES NOT CREATE THE SORT OF COMPREHENSIVE REMEDY THAT COULD SUPPORT SECTION 1983 PRECLUSION.

In holding that enactment of Title IX precluded the use of section 1983 to advance constitutional claims of gender discrimination, the court of appeals

entirely skipped over the direct evidence, described above, that Congress had no such intent. That is enough to dispose of this case: the controlling consideration here is what Congress intended. But even disregarding the direct evidence of that intent, the holding below is wrong on its own terms. The court of appeals simply presumed that the existence of a private right of action under Title IX precludes recourse to section 1983 to challenge unconstitutional gender discrimination by a school. That analysis failed to recognize this Court's strongly stated reluctance to find preclusion of section 1983 to enforce, not a newly created statutory right, but pre-existing constitutional rights; disregarded the considerations found controlling by the Court in prior preclusion cases; paid no attention to the non-comprehensive nature of Title IX; and assumed, incorrectly, that implied and express rights of action are identical for preclusion purposes. Each of these errors requires reversal.

A. Congress's Creation Of New Remedies For The Assertion Of New Statutory Rights Does Not Support A Presumption That Congress Intended Those Remedies To Preclude The Use Of Section 1983 To Enforce Pre-Existing Constitutional Rights.

The Court has explained that there is a "'presumption,'" albeit a rebuttable one, that rights created by federal law are "enforceable under § 1983'" (*Rancho Palos Verdes*, 544 U.S. at 120 (quoting *Blessing* v. *Freestone,* 520 U.S. 329, 341 (1997))); the Court has been unanimous in describing the showing that must be made to rebut that presumption as a "difficult" one (*Blessing*, 520 U.S. at 346) that has

been satisfied only in "exceptional cases." *Livadas* v. *Bradshaw*, 512 U.S. 107, 133 (1994). Of course, the defendant "may defeat this presumption by demonstrating that Congress did not intend [the section 1983] remedy [to be used to assert] a newly created right. * * * [E]vidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Rancho Palos Verdes*, 544 U.S. at 120 (quoting *Blessing*, 520 U.S. at 341). And the Court has indicated that "[t]he provision of an express, private means of redress in the statute [creating the right] itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Id*. at 121. The court below relied primarily on this presumption. See Pet. App. 19a-20a, 23a. For several reasons, its analysis was wrong.

To begin with, the court below fundamentally misunderstood the reasoning of *Rancho Palos Verdes* and *Sea Clammers*, upon which it principally relied in concluding that the existence of an alternative statutory right of action "is strong evidence of congressional intent to preclude parallel actions under section 1983." Pet. App. 20a (addressing Title IX claims); *id*. at 23a (same "observations" apply to section 1983 constitutional claims). It was essential to this Court's holdings in those cases that the plaintiffs were attempting to use section 1983 to enforce *statutory rights*, *created by Congress, for which Congress had provided special remedies*. The limits on those remedies, which Congress provided specially for the enforcement of the rights it had created, would have been rendered wholly nugatory had plaintiffs been able to enforce those same statutory

rights under section 1983. The Court thus emphasized in *Sea Clammers* that the plaintiffs were using section 1983 to allege that the defendants "'violated a federal statute which provides *its own comprehensive enforcement scheme*.'" 453 U.S. at 20 (emphasis added). The Court made the same point repeatedly in *Rancho Palos Verdes*, stating that the governing test requires a showing that Congress did not intend use of section 1983 to enforce "a *newly created* right"; indicating that evidence of preclusive congressional intent may be found "directly *in the statute creating the right*" or inferred from "*the statute's* creation of a 'comprehensive enforcement scheme"; and referring to the availability of a remedy other than section 1983 "for *statutory violations*" or for "violations of *federal statutory rights*." 544 U.S. at 120, 121 (emphasis added).

In fact, that consideration explicitly was the basis for the Court's holding in *Rancho Palos Verdes* that 47 U.S.C. § 332(c)(7), a provision of the Telecommunications Act of 1996 ("TCA"), precluded use of section 1983 to assert rights *created by that Act*:

> [T]he crux of our holding is that § 332(c)(7) has no effect on § 1983 whatsoever: The rights § 332(c)(7) created may not be enforced under § 1983 and, conversely, *the claims available under § 1983 prior to the enactment of the TCA continue to be available after its enactment*. * * * "The right [Abrams] claims under [§ 332(c)(7)] did not even arguably exist before passage of [the TCA]. The only question here, therefore, is whether the rights created by [the TCA] may be asserted within the *remedial* framework of [§ 1983]."

544 U.S. at 126 (quoting *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 376-77 (1979)) (bracketed material added by the Court; first emphasis added).

In divining congressional intent, this distinction – between newly created rights that carry with them their own remedy, and pre-existing rights that always were separately enforceable under section 1983 – is crucial. It makes obvious sense to assume, as did the Court in *Rancho Palos Verdes*, that Congress's "provision of an express, private means of redress" for violations of a statutory right that it created *in the same statute* "did not intend to leave open a more expansive remedy under § 1983." 544 U.S. at 121. But very different presumptions apply when, as here, the question is whether Congress precluded use of section 1983 to enforce a *constitutional* right that plainly "*did* exist before the passage" of the law creating a new statutory right and its associated remedy (*id.* at 126 (emphasis added)), and that "would be actionable even if Congress had never enacted Title IX." *Cmtys. for Equity* v. *Mich. High School Athletic Ass'n*, 459 F.3d 676, 684 (6th Cir. 2006), cert. denied, 127 S. Ct. 1912 (2007).

In that sort of situation, far from assuming that a new remedy was meant to supplant an older one, "the Court has accepted overlap between a number of civil rights statutes." (CBOCS *West, Inc.* v. *Humphries*, 128 S. Ct. 1951, 1961 (2008). It also has consistently understood legislation in the area of civil rights to have "evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). See *Novotny*, 442 U.S. at 377-78. And the Court generally has presumed that Congress does

not intend to work implied repeals (see, *e.g.*, *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)) – which is the effect of the holding below that Title IX abrogated section 1983 as a remedy for a specified category of constitutional claims.[6] In such circumstances, as Judge Morris Sheppard Arnold wrote for the Eighth Circuit, the preclusion rule of *Sea Clammers* "is plainly inapposite [to Title IX]. *Sea Clammers* in no way restricts a plaintiff's ability to seek redress via § 1983 for violation of independently existing constitutional rights, even if the same set of facts also gives rise to a cause of action for statutory rights." *Crawford* v. *Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997).

B. Title IX Does Not Create The Sort Of Comprehensive Remedy That Should Be Deemed To Reflect A Congressional Intent To Preclude Use Of Section 1983 To Enforce Constitutional Rights.

In the circumstances of this case, the Court accordingly should not hold that Congress intended a new statutory remedy to preclude use of section 1983 to enforce a constitutional right unless the defendant can make the clearest showing that Congress had a preclusive intent. Here, such an intent would have

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[6] Implied repeal is not involved when the question is whether a remedy attached to *a newly created right* precludes use of section 1983 to assert *that* right; then, the only question is "whether the rights created by a later statute 'may be asserted within the *remedial* framework' of the earlier one." *Rancho Palos Verdes*, 544 U.S. at 120 n.2 (quoting *Novotny*, 442 U.S. at 376-77). But in a case like this one, where the rights asserted under section 1983 *did* "exist before the passage" of Title IX (*Novotny*, 442 U.S. at 376), the new statute is said to take away a previously available remedy and therefore does work a repeal.

to be "inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Rancho Palos Verdes*, 544 U.S. at 120. But there is absolutely no evidence that Congress had any such intent. Title IX is not "comprehensive" in the relevant sense: there are very significant areas of discrimination as to which that statute does not provide a right of action but the Constitution and section 1983 do. And Title's IX's enforcement regime is not incompatible with invocation of section 1983: to the contrary, section 1983 actions to enforce the Constitution would directly complement Title IX and would not undermine the congressional scheme in any respect.

Before turning to the relationship between Title IX and section 1983, one preliminary point bears note: it is not at all clear what a rule precluding recourse to section 1983 would mean if applied in the Title IX context. Identifying the scope of preclusion is straightforward in statutory cases like *Rancho Palos Verdes* and *Sea Clammers*, where Congress simply barred use of section 1983 to enforce rights created by particular statutes.[7] But nothing like that sort of neat determination is possible in this type of case, where Title IX is said to preclude use of section 1983 to enforce an ill-defined category of claims arising under the Constitution.

For its part, the First Circuit declared that "Congress saw Title IX as the sole means of vindicating

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[7] The same was true in *Smith* v. *Robinson*, which is discussed in more detail below; there, the preclusion ran to a single type of narrowly defined claim: that of a handicapped child to an appropriate public education. See 468 U.S. at 1011.

the constitutional right to be free from gender discrimination by educational institutions" (Pet. App. 24a), by which it seemingly meant that Title IX occupies the field of gender discrimination claims involving schools. The court below also said, somewhat inconsistently, that Title IX bars section 1983 constitutional claims that are "virtually identical" to ones that may be advanced under the statute (*id.* at 23a) – but the court nevertheless held use of section 1983 to be precluded even though it appeared to acknowledge that constitutional protections might be *more expansive* than those provided by Title IX. *Id.* at 22a. This uncertainty suggests that preclusion here would be a very different animal from that addressed in other cases where the Court has applied the doctrine – and thus supports the conclusion that preclusion would not be appropriate here at all.

1. To begin with, Title IX is not comprehensive in any sense that could reflect a congressional intent generally to preclude invocation of section 1983 when challenging gender discrimination by educational institutions. For one thing, Title IX and the Equal Protection Clause are not co-extensive in scope. Title IX reaches the significant category of institutions that are *not subject to section 1983* – nonpublic schools that accept federal funds. The statute thus plainly adds "remedies to those available under § 1983." *Rancho Palos Verdes*, 544 U.S. at 122. On the flip side of the coin, constitutional claims advanced under section 1983 may reach very important types of gender discrimination by educational institutions that are *not actionable under Title IX*, making this a paradigmatic example of a case where the newer statutory remedy was intended "to complement, rather than supplant, § 1983." *Ibid.*

First, if the rule of preclusion announced by the court below is taken literally – if "Title IX [is] the sole means of vindicating the constitutional right to be free from gender discrimination by educational institutions" (Pet. App. 24a) – significant instances of gender discrimination will be left with no statutory remedy at all. Most obviously, such a rule would bar redress under section 1983 for constitutional violations by public institutions that do not accept federal funds. In addition, Title IX contains numerous express exceptions to its application that reach, for example, admissions policies of elementary and secondary schools (see 20 U.S.C. § 1681(a)(1)), as well as of a public educational institution that "traditionally and continually from its establishment has had a policy of admitting only students of one sex" (§ 1681(a)(5)) or that has just begun admitting students of both sexes (§ 1681(a)(2)). Institutions that are associated with religious organizations may be exempted from Title IX altogether (§ 1681(a)(3)), as are military academies (§ 1681(a)(4)); Title IX also exempts contact sports from certain nondiscrimination requirements. 34 C.F.R. § 106.41. There is no doubt, however, that gender discrimination by institutions in these categories may violate the Constitution, as this Court has held. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515 (1996); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982).[8] It is inconceivable that Congress intended Title IX to insu-

[8] The Department of Education has recognized these differences: "because the scope of the Title IX statute differs from the scope of the Equal Protection Clause, * * * regulations [implementing Title IX] do not regulate or implement constitutional requirements or constitute advice about the U.S. Constitution." 71 Fed. Reg. 65233 n.16 (Oct. 25, 2006).

late such constitutional violations from challenge under section 1983.

Second, and similarly, there may well be areas involving claims of gender discrimination where the coverage of Title IX and of the Equal Protection Clause differ. There is no reason to assume that the protections conferred by these provisions are substantively identical in all respects and in all cases; their different constitutional foundations, respectively the Spending Clause and the Fourteenth Amendment, may well affect their scope. Indeed, in this case, petitioners argued that different standards governed their Title IX and section 1983 claims – and the First Circuit, although it acknowledged that might be so (see Pet. App. 22a), still held the section 1983 constitutional claim precluded. See also *Williams* v. *School Dist. of Bethlehem, Pennsylvania*, 998 F.3d 168 (3d Cir. 1993) (section 1983 equal protection claim precluded even though Title IX might not apply). Here, too there is absolutely no evidence in Title IX, and no foundation in any of this Court's preclusion decisions, to support the view that Congress intended Title IX to displace pre-existing and *more expansive* constitutional guarantees that differ in scope from Title IX statutory protections.

Third, even when a common nucleus of fact gives rise to Title IX and section 1983 constitutional claims that are both cognizable – which is to say, even when the statutory and constitutional claims are ones characterized by the First Circuit as "virtually identical" – significant anomalies would follow from a holding that Title IX precludes section 1983 claims. Most notably, section 1983 permits actions against the individuals responsible for constitutional violations, while Title IX has been held to permit suit

only against the institution. But there may well be circumstances where a plaintiff has good reason for seeking to hold the individual wrongdoer responsible while sparing the school liability. Preserving that possibility is wholly consistent with the goal of Title IX; the Court made a very similar point in *Cannon*, where it found that the severity of a complete cut-off of federal funds militated in favor of recognition of a private Title IX right of action, thus allowing plaintiffs to pursue more limited and targeted relief. 441 U.S. at 705.

In addition, and perhaps more fundamentally, deterrence of constitutional violations has always been recognized as a principal goal of section 1983 (see, *e.g.*, *Wyatt* v. *Cole*, 504 U.S. 112, 161 (1992)), and that aim is materially advanced by the prospect of individual liability. In *Carlson* v. *Green*, 446 U.S. 14 (1980), for example, the Court held that an Eighth Amendment *Bivens* action was available against federal prison officials even though a statutory remedy could be sought against the United States. The Court explained that a *Bivens* cause of action – comparable, for present purposes, to the section 1983 cause of action presented in this case (see *id.* at 21 n.6; *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999)) – could be "more effective" because "the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. * * * It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability." *Id.* at 20-21 (citations omitted).[9]

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[9] *Carlson*'s assessment of the special deterrent role of *Bivens* and section 1983 actions against individual government agents

Carlson's observation about deterrence has full application to cases like this one, where it is undisputed that no Title IX cause of action could lie against Superintendent Dever. School officials may not spend their careers in a single system's employ (by the time of his deposition, Dever had moved from the Barnstable school system to a position in New Jersey). The prospect of frozen federal funds to the school that employs them, or even of an award of damages against that school, must be of far less deterrent power than the prospect of a judgment against the officials themselves.

Indeed, as already noted, a holding that Title IX precludes such claims would have the perverse effect of insulating individual wrongdoers from personal responsibility for their role in committing even serious and blatant constitutional violations in the establishment of school policy.[10] Congress could not have had any such intent. The Court suggested as much in *Gebser*; even while holding that a school may not be made liable for sexual harassment by a teacher absent a showing of notice and deliberate indifference on the part of the institution, the Court

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has been twice endorsed by the Court in recent years. See *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 69-70 (2001); *F.D.I.C.* v. *Meyer*, 510 U.S. 471, 485 (1994).

[10] The First Circuit preserved the possibility of a section 1983 action against an individual when that defendant is alleged to have committed "an independent wrong, separate and apart from the wrong asserted against the educational institution." Pet. App. 24a. But its rule precludes individual liability for the most serious and harmful type of constitutional violation – that committed by an official who establishes and implements an unconstitutional policy.

declared that "[o]ur decision does not affect any right of recovery that an individual may have against * * * the teacher in his individual capacity * * * under 42 U.S.C. § 1983." 524 U.S. at 292. And there is direct evidence that Congress intended section 1983 to remain available even in cases where the statutory and constitutional claims are no less "virtually identical" than they are in this case: the pre-Title IX decisions that permitted parallel Title VI and section 1983 claims to proceed fell into this category. The Congress that enacted Title IX therefore plainly would have regarded these sorts of "overlap" claims to be permissible.

2. Even apart from limits on the substantive scope of Title IX, nothing in the nature of the remedies provided by that statute is "'incompatible with individual enforcement under § 1983'" or provides "an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Rancho Palos Verdes*, 544 U.S. at 120, 121 (citation omitted). The point comes clear from considering *Rancho Palos Verdes* and *Sea Clammers*, the two decisions in which the Court held section 1983 unavailable to enforce statutory rights. In *Sea Clammers*, the statutes creating the rights at issue "contain[ed] unusually elaborate enforcement provisions" (453 U.S. at 13), including citizen suit provisions that were limited by notice and other requirements. *Id*. at 15. The same was true in *Rancho Palos Verdes*, where the statute creating the right asserted also contained its own enforcement procedure that limited the relief available (see 544 U.S. at 122-23), established an unusually short statute of limitations, and provided for expedited review (*id.* at 122) in a manner "resembl[ing] that governing many federal agency decisions." *Id*. at 128 (Breyer, J., concurring). These

remedial limits were essential corollaries of the newly created statutory rights, and would have been wholly circumvented had a section 1983 remedy been available. See *Sea Clammers*, 453 U.S. at 20-21; *Rancho Palos Verdes*, 544 U.S. at 122-23, 127.

Related considerations explain the outcome in *Smith* v. *Robinson*, where the Court held that the Education of the Handicapped Act (EHA), 20 U.S.C. § 1400 *et seq.*, precludes use of section 1983 to enforce a handicapped child's equal protection claim to an appropriate public education – the *only* occasion on which the Court has found that Congress precluded use of section 1983 to enforce a constitutional right. In doing so, the Court emphasized that "[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim. Since 1871, when it was passed by Congress, § 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights." 468 U.S. at 1012. The Court specifically found, however, that "[b]oth the provisions of the [EHA] and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute." *Id.* at 1009. See *id.* at 1016 ("in enacting the EHA, Congress was aware of, and intended to accommodate, the claims of handicapped children that the Equal Protection Clause required that they be ensured access to public education").

In particular, the Court explained that the EHA contained "elaborate substantive and procedural re-

quirements" (*Smith*, 468 U.S. at 1006) that "effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review." *Id*. at 1011. Reviewing these intricate processes, the Court concluded:

> In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education. Not only would such a result render superfluous most of the detailed protections outlined in the statute, but, more important, it would also run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education. No federal district court presented with a constitutional claim to a public education can duplicate that process.

Id. at 1011-12 (footnote omitted).

Against this background, the Court concluded that "Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored

scheme." *Smith*, 468 U.S. at 1012. See also *id.* at 1023-24 (Brennan, J., dissenting) ("Congress surely intended that individuals with claims covered by [the EHA] would pursue relief through the administrative channels that the Act established before seeking redress in court."). In doing so, the Court again noted specific evidence in the statute's history "that Congress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education." *Id.* at 1012-13.[11]

Title IX's remedial scheme is not remotely like those held preclusive in *Sea Clammers*, *Rancho Palos Verdes*, and *Smith*. The first two of those cases considered specific limits on procedures that were specially created by Congress to enforce newly created rights, and that would have been "distort[ed]" were section 1983 available. *Rancho Palos Verdes*, 544 U.S. at 127. Title IX, in contrast, contains no special enforcement procedures that would be circumvented by allowing suit under section 1983 and, more fundamentally, offers no indication at all that Congress wanted to limit remedies for pre-existing rights.

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[11] Even so, within two years of the decision in *Smith*, Congress amended the EHA to specifically provide for attorneys' fees in claims under the statute (see 20 U.S.C. § 1415(l)) and, some courts have concluded, to disapprove this Court's preclusion of section 1983 claims. See, *e.g.*, *Padilla* v. *School Dist. No. 1*, 233 F.3d 1268, 1273 (10th Cir. 2000) (amendment "obviously voided *Smith*'s broad holding that the EHA precludes overlapping but independent claims otherwise cognizable under the Constitution"); *Sellers* v. *School Bd. of the City of Manassas*, 141 F.3d 524, 530 (4th Cir. 1998) (same); but see *A.W.* v. *Jersey City Pub. Schs*, 486 F.3d 791, 803 (3d Cir. 2007) (amendment did not set aside *Smith*'s holding).

As for *Smith*, its striking contrasts with this case demonstrate why preclusion is *inappropriate* here. There, the Court repeatedly emphasized specific evidence that Congress affirmatively sought to provide a new statutory mechanism that would be the exclusive method with which to enforce a handicapped child's *constitutional right* to an appropriate public education; in this case, there is absolutely no evidence that Congress meant Title IX to substitute for the enforcement of constitutional rights. In *Smith*, Congress provided an exceptionally intricate and comprehensive remedial scheme; here, even leaving aside for the moment that the Title IX private remedy does not appear expressly in the statute at all (a point addressed further below), the statute offers no special procedures. And in *Smith*, recourse to section 1983 would have entirely displaced the cooperative process that Congress thought would best accommodate the needs of handicapped children; here, suits under section 1983 would not pre-empt, or be at all incompatible with, the enforcement mechanism provided by Title IX. In the absence of *any* of the considerations that led to preclusion in *Smith*, that holding provides no support for the decision below.[12]

[12] *Rancho Palos Verdes* actually characterized *Smith* as finding "§ 1983 unavailable to remedy violations of federal *statutory* rights" (544 U.S. at 121 (emphasis added)), which perhaps reflects a reluctance to find section 1983 unavailable for the assertion of constitutional rights.

C. Private Rights Of Action Implied By Courts Do Not Demonstrate A Congressional Intent To Preclude Use Of Section 1983.

1. There is a final reason, evident in the plain statutory language, that recourse to section 1983 should not be thought barred by Title IX. Preclusion may be found only if there is "specific evidence" that Congress meant to bar actions under section 1983 (*Wright* v. *Roanoke Redev. & Hous. Auth.,* 479 U.S. 418, 423 (1987)); there must be either direct evidence of such intent or a finding that use of section 1983 "'would be inconsistent with Congress' carefully tailored scheme.'" *Blessing*, 520 U.S. at 346. But in Title IX, Congress provided *no* express private enforcement scheme at all. The only express remedy in the statute is agency enforcement action (see *Gebser*, 524 U.S. at 280), which is not preclusive of section 1983. See, *e.g.*, *Blessing*, 520 U.S. at 347-48. As for private rights, "Title IX does not by its terms create *any* private cause of action whatsoever * * *. The only private cause of action under Title IX is judicially implied." *Davis*, 526 U.S. at 656 (Kennedy, J., dissenting) (emphasis added). Congress therefore "said nothing about the applicable remedies for an implied right of action." *Franklin*, 503 U.S. at 71.

It is impossible to believe that Congress intended Title IX to preclude invocation of Section 1983 while leaving it to the courts through the implication of a private remedy to establish the contours of and limits on the Title IX private right of action. In fact, attempting to satisfy the *Sea Clammers* standard by divining congressional intent in this context is an almost nonsensical enterprise: "Quite obviously, the search for what was Congress' *remedial* intent as to

a right whose very existence Congress did not expressly acknowledge is unlikely to succeed." *Franklin*, 503 U.S. 60, 76 (Scalia, J., concurring in the judgment). The same is true of any search for Congress's preclusive intent.

It is no answer to this point to suggest that, when implying a right of action, courts are just finding hidden law that Congress left for them to discover. As then-Justice Rehnquist noted in *Cannon*, at the time that Congress enacted Title IX it "tended to rely to a large extent on the courts to decide whether there should be a private right of action, rather than determining this question for itself." 441 U.S. at 718 (Rehnquist, J., concurring). And the Court has made clear that, "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute. * * * That endeavor inherently entails a degree of speculation[."] *Gebser*, 524 U.S. at 284. See *Davis*, 526 U.S. at 685 (Kennedy, J., dissenting) ("[t]he definition of an implied cause of action inevitably implicates some measure of discretion in the Court to shape a sensible remedial scheme"). The reality, then, is that Congress did not specifically predetermine the scope of the Title IX private remedy, and could have had no certainty as to the contours of any remedy that would be implied. It would have been a remarkable leap of faith for Congress to have intended this sort of inchoate right to be preclusive of constitutional remedies.

2. In addition, because the assertedly preclusive right of action is judicially implied, applying a rule of preclusion would create intractable practical problems that Congress could not have intended. First,

courts would have to determine the scope of the section 1983 constitutional claims that Congress barred, in the absence of any direct guidance from the Legislature. And if Congress is deemed to have precluded use of section 1983 to assert constitutional claims "virtually identical" to those that may be pursued under Title IX, courts presented with equal protection gender discrimination challenges under section 1983 would have to determine whether Title IX would in fact support similar claims, even if such statutory claims were not advanced in the case. But precisely because the Title IX right of action is implied, determining the nature of that action often has been difficult and contentious: in many of the Title IX cases decided by this Court, the courts of appeals had been divided on the issue presented (see *Jackson*, 544 U.S. at 172; *Davis*, 526 U.S. at 637; *Gebser*, 524 U.S. at 280) or this Court reversed the decision below (*Franklin*, 503 U.S. at 68), and this Court's three most recent Title IX decisions (*Jackson*, *Davis*, and *Gebser*) have been decided by votes of five-to-four. These interpretative difficulties can be expected to continue; the precise "contours [of the Title IX] action are, as yet, unknowable." *Davis*, 526 U.S. at 657 (Kennedy, J., dissenting).

This reality often would make resolution of threshold preclusion determinations enormously difficult. Imagine, for example, that this case had been brought in 1990 as a constitutional claim under section 1983. If the First Circuit's approach is correct, the district court would have had to decide whether a Title IX claim was possible, requiring it to anticipate this Court's decision in *Franklin* (that damages are available under Title IX), in *Gebser* (that a Title IX action is available for sexual harassment), and in *Davis* (that a Title IX action is available for peer-on-

peer harassment) – all questions that are not presented by, and are unnecessary to the resolution of, a section 1983 constitutional claim. Congress should not be presumed to have erected such a bizarre and unworkable regime.

To endorse the holding below, the Court would be required to conclude that, by omission, Congress displaced the use of section 1983 to assert pre-existing constitutional claims, substituted a more limited statutory remedy, and, at least to some degree, occupied the field of gender discrimination claims. This is an extravagant reading of a statute that confers no express rights at all. "'[W]hatever the merits of 'implying' rights of action may be, there is no justification for treating [congressional] silence as the equivalent of the broadest imaginable right of remedial authority.'" *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment). But that, effectively, is what the First Circuit did; by finding a congressional intent to preclude, it has engaged in the most expansive and speculative possible reading of Title IX.

The Court has *never* held recourse to section 1983 precluded when the assertedly preclusive statute does not provide an express private right of action. In *Rancho Palos Verdes*, it was careful to state its test in those terms. See 544 U.S. at 121 ("The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."). Indeed, the Court has rejected preclusion in circumstances where a private right of action *had* been implied. See *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 516, 522 n.19 (1990). The same outcome is appropriate here.

III. THE COURT SHOULD REVERSE AND REMAND THE CASE FOR FURTHER LITIGATION UNDER THE PROPER STANDARD.

If the Court agrees with our submission that Title IX does not preclude the assertion of constitutional claims under section 1983, it should reverse the judgment of the First Circuit and remand the case for further proceedings. No court has ever considered – much less decided – the merits of petitioners' constitutional claim or the relationship of that claim to the one asserted under Title IX. On remand, it would be appropriate for the district court to consider those issues in the first instance.

Prior to the filing of the complaint in this case, the First Circuit had allowed parties raising Title IX claims, or unable to make out cognizable Title IX claims, to pursue claims of gender discrimination under other civil rights statutes or the Constitution. See *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *United States* v. *Mass. Maritime Academy*, 762 F.2d 142 (1st Cir. 1985). By the same token, at the time of filing the First Circuit regularly analyzed disparate treatment claims as a species of Fourteenth Amendment violation remediable under section 1983. See, *e.g.*, *Starlight Sugar, Inc.* v. *Soto*, 253 F.3d 137 (1st Cir. 2001); *Collins* v. *Nuzzo*, 244 F.3d 246 (1st Cir. 2001).

Against this background, petitioners could not reasonably have been on notice that all of their theories would have to be developed under Title IX; in particular, they could not have known that section 1983 was unavailable for the assertion of a disparate treatment theory of the sort that may be available in this case. See page 10, *supra*. Therefore, when petitioners' section 1983 claim was dismissed, the scope

of the subsequent litigation was substantially constrained. The parties proceeded on the understanding that a disparate treatment claim pursued under section 1983, as well as any arguments that petitioners might make regarding differences in the Title IX and equal protection liability standards, were no longer available. The record below amply reflects that the parties thought the district court's dismissal of the section 1983 claim substantially reshaped the contours of the case.[13]

This Court "ordinarily do[es] not decide in the first instance issues not decided below." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam). Indeed, when an error in the lower courts infected the course of subsequent proceedings, this Court's regular practice is to vacate the rulings under review and direct further proceedings on remand free from the identified error. See, *e.g.*, *Cooper Indus.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004) (where lower court had not determined whether statute provided cause of action, a matter "well beyond the scope of the briefing and, indeed, the question presented," the issue deserved "full consideration by the courts below"); *Roberts* v. *Galen of Va.,*

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[13] See, *e.g.*, Br. for Plaintiffs-Appellants, No. 06-2596 (1st Cir. 2006), at 54 (petitioners' argument that section 1983 and Title IX liability standards differ); Mem. Law Supp. Barnstable Sch. Comm.'s Mot. Summ. J., No. 02-10604 (D. Mass.), at 2 (characterizing Title IX claim as petitioners' "sole remaining claim"); *id.* at 14 (argument that "Title IX plaintiffs have no right to make particular remedial demands"); Tr. of Dep. of Russell J. Dever at 16-18 (Ex. 6 to Aff. of Wendy A. Kaplan, District Court Docket No. 36) (testimony elicited that Respondent Dever "did not see sexual harassment as discrimination" under Title IX, but no questioning pursued regarding sexual harassment as violating Equal Protection Clause).

Inc., 525 U.S. 249, 253-54 (1999) (per curiam) ("declin[ing] to address * * * at this stage in the litigation" claims that "do not appear to have been sufficiently developed below for us to assess them" and remanding for further proceedings); *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1033 (1992) (Kennedy, J., concurring) (emphasizing appropriateness of Court's decision to "establish a framework for remand" but leave further adjudication to the courts below because "[t]he facts necessary to the determination have not been developed in the record").

In this case, there was no development in the lower courts of (a) the appropriate standard for evaluating petitioners' section 1983 claim; (b) the facts concerning disparate treatment that petitioners meant to pursue under section 1983; or (c) the merits of a section 1983 claim against Superintendent Dever, including any defenses (such as qualified immunity) available under section 1983 but not under Title IX. It would be premature, therefore, for the Court to do any more than resolve the question presented concerning the interaction of section 1983 and Title IX and remand for further proceedings.

CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

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